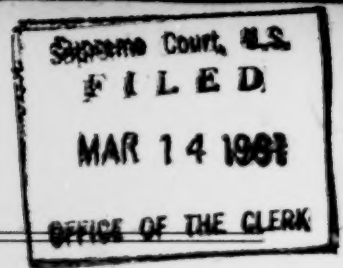


(4)
No. 90-976



In The
Supreme Court of the United States
October Term, 1990

ANCLOTE MANOR HOSPITAL, INC.; WALTER H.
WELLBORN, JR., M.D.; ARHTUR R. LAUTZ;
MANUEL VALLES, JR.; ROBERT L. CROMWELL;
THOMAS C. FARRINGTON, JR.; THOMAS E.
McLEAN; JAMES C. TREZEVANT, JR.; SERGE
BONANNI; LORRAINE HIBBS; ALBERT C. JASLOW,
M.D.; ROBERT J. VAN DE WETERING, M.D.;
WALTER L. COOPER; JAMES D. O'DONNELL,

Petitioners,

v.

LAWRENCE J. LEWIS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To
United States Court Of Appeals For The
Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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for the Respondent

QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eleventh Circuit deny the parties procedural due process when it denied the parties' right to brief the issue of the appropriateness of the order awarding minimal sanctions?

II. Did the United States Court of Appeals for the Eleventh Circuit err in its application of the standard of review of the order awarding minimal sanctions?

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STATEMENT OF THE CASE

Respondent, Lawrence J. Lewis, M.D. ("Lewis"), adopts the Statement of the Case of Petitioners, with the following corrections:

1. In his statement of the case, counsel for Petitioners misleads the Court by failing to disclose that Lewis' claim was based upon his status as a contributor to Anclothe Psychiatric Center, Inc. (APC), the corporation which Lewis alleged that Petitioners defrauded, which is a 26 U.S.C. Section 501(c)(3) Public Charity, and not his status as a "former APC employee." By inartfully describing Lewis solely as a "former APC employee", even though he knew that Lewis' "standing" was based upon his status as a contributor to APC, counsel for Petitioners has mischaracterized Lewis' role as Plaintiff.

It should be noted that the U.S. Magistrate, in her Report and Recommendation dated May 3, 1990, at page 20 (reproduced in the Supplemental Appendix to Petition for Writ of Certiorari, hereinafter "Supplemental Appendix"), specifically held that "[i]t does not appear to the undersigned that counsel has ever attempted to mislead or deceive the court or opposing counsel during the course of this litigation concerning plaintiff's

theory of standing." Following a two-day evidentiary hearing held April 27 and 30, 1990, the U.S. Magistrate determined that:

[A]lthough defendant's motion for summary judgment was granted on the grounds that plaintiff lacked standing, sanctions are not warranted on the basis of any insufficient pre-filing inquiry regarding basis in law to bring suit. Further, it does not appear that plaintiff's counsel advanced a position regarding standing to sue which was intended to mislead or deceive the court. [Citations Omitted] (*See Supplemental Appendix 20-21.*)

2. There is no evidence in the record that "Lewis and his counsel fomented a series of newspaper articles regarding the AMH transactions..." In fact, the Magistrate specifically determined that "[t]here is no suggestion in the record before the undersigned that plaintiff or his counsel filed this suit in bad faith or for purposes of harassing defendants or forcing defendants to offer him a quick cash settlement..." *See Supplemental Appendix, at 21.* The Magistrate then concluded that neither Lewis nor his counsel filed the action for an improper purpose, and thus sanctions were not warranted under the improper purpose element of Rule 11. *See Supplemental Appendix, at 22-23.*

REASONS FOR DENYING THE WRIT

I

THE APPELLATE COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

There can be no question that the Appellate Court did *not* depart from the accepted usual course of judicial proceedings. Petitioners *claim* that the Appellate Court denied the parties the right to brief the issue of the propriety of the District Court Order granting sanctions, since it was issued after the parties' briefs on appeal were filed. As demonstrated below, this claim has no merit.

The Federal Rules of Appellate Procedure, which were complied with scrupulously by the Eleventh Circuit in this case, deal specifically with the circumstances herein which "authorities come to the attention of the party after the party's brief has been filed." Fed. R. App. P. Rule 28(j) specifically provides:

(j) Citation of Supplemental Authorities.

When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after

oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Thus, it was Petitioner's burden to "promptly advise" the Eleventh Circuit of any authorities that they desired to raise after the filing of their brief. And, Petitioners in fact availed themselves of that opportunity in this case on at least two separate occasions (by letters dated June 1, 1990 and June 12, 1990), both of which are part of the record in this case. Accordingly, there is no basis to consider that the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings by failing to allow Petitioners to file additional briefs, since Petitioners availed themselves of Rule 28, which specifically provides a procedure by which the parties can advise the court of authorities that come to their attention after their briefs have been filed.

Moreover, to the extent that Petitioners desired to address the issue raised by the Magistrate's Report and Recommendation, which was considered by both the

District Court and Eleventh Circuit in reaching their decisions, each of the parties filed lengthy and detailed objections to the Magistrate's Report and Recommendations.

As the record clearly reflects, after the filing of the initial set of briefs, the United States Magistrate conducted an evidentiary hearing on the question of sanctions on April 27 and 30, 1990. The exhaustive Report and Recommendation prepared by the Magistrate, which is reprinted in the Supplemental Appendix to Petition for Writ of Certiorari, consists of some 28 pages. The Magistrate specifically concluded that (1) Lewis' counsel had fulfilled his legal pre-filing duties, (2) neither Lewis nor his counsel had engaged in conduct that was unreasonable or vexatious, (3) there was no violation of the improper purpose element of Rule 11, and (4) sanctions should not be imposed against Dr. Lewis himself. The Magistrate merely found that the Plaintiff's lawyer had violated Rule 11 *only* by failing to satisfy his factual pre-filing inquiries, in that he "relied unreasonably solely upon the information provided by his client as to some of the RICO allegations of the complaint." See Supplemental Appendix, at 25. The Court concluded that the amount of \$4,420.00 was an appropriate amount of monetary sanction

to require Plaintiff's counsel to pay. *But see Beeman v. Fiester*, 852 F.2d 206, 208, 210, 211 (7th Cir.1988) (suggesting that the Magistrate was incorrect in determining that Plaintiff's counsel failed to satisfy his factual pre-filing duties in this complex RICO case.)

Upon the issuance of its Report and Recommendation, the Magistrate authorized submission of written objections. Both parties elected to file such objections, which specifically addressed each element of the Magistrate's decision. Further, as set forth below, both the District Court, and Appellate Courts specifically acknowledged that they considered the parties' objections filed in response to the Magistrate's Report and Recommendation in reaching their decisions.

By order dated May 22, 1990, the Honorable William Terrell Hodges, stated:

Upon consideration of the report and recommendation of the Magistrate and upon this Court's independent examination of the entire file, *including the objections of the parties to the report and recommendation*, the Magistrate's report is adopted and confirmed and made part hereof.

(The District Court Order of May 22, 1990, which is apparently missing from the appendices of the Petition, is reproduced in the appendix to this response.) The Eleventh Circuit then ruled on July 30, 1990 (which Order is reproduced in Appendix A in the Petition for Writ of Certiorari) that it "*carefully reviewed both parties' objections to the report and recommendation of the magistrate. We find those objections to be without merit.* [Emphasis supplied.]" Thus, both the District Court and Eleventh Circuit specifically acknowledged that they considered the parties' objections filed in response to the Magistrate's Report and Recommendation in reading their decisions.

In support of their claim that the Appellate Court far departed from the accepted course of judicial proceedings, the only legal authority Petitioners cite is this Court's decision in *Rice v. Sioux City Memorial Park*, 349 U.S. 70 (1955). (Petitioners also argue based upon Federal Rule of Appellate Procedure 4(a)(4), which by their own admission is inapplicable to this situation, and thus not controlling.) Not only, however, is the *Rice* case clearly opposite to this case, but the Court's decision in the *Rice* case suggests that certiorari in this case should be *denied*.

In *Rice*, plaintiff had brought an action for damages for breach of a contract which contained a covenant that was restrictive on the grounds of race. The Iowa trial court held that the clause was not void, but was unenforceable as a violation of the Constitution and public policy of Iowa and the United States. It further held that "'the action of a state or federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action' contrary to the fifth and fourteenth Amendments." 349 U.S. at 72. When the Supreme Court of Iowa affirmed, plaintiff petitioned before this Court for certiorari, relying on the Fourteenth Amendment through the Due Process and Equal Protection clauses. This Court granted certiorari, "according to our practice, because at least four members of the Court deemed that despite the rather unique circumstances of this case Iowa's willingness to enforce this restrictive covenant rendered it 'special and important'." 349 U.S. at 74. The Supreme Court affirmed the decision of the Iowa Supreme Court.

The Petitioner in *Rice* then filed for rehearing before the Supreme Court, directing this Court's attention to an Iowa statute, enacted during the pendency of the litigation, but before reaching this

Court on Petitioners' application for certiorari. (The statute in question in *Rice* barred the ultimate question presented from arising again in the state of Iowa.) This Court granted the petition to rehearing, noting that the Statute was "not seen in proper focus because blanketed by the issues of 'state action' and constitutional power." 349 U.S. at 73.

In reviewing the criteria by which it determines whether a particular case meets consideration, this Court determined that it had "improvidently granted" certiorari.

But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. [Citations omitted.]

349 U.S. at 74. The Supreme Court held further that: "Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first

instance." 349 U.S. at 76. The Supreme Court vacated its order affirming the Iowa Supreme court, and dismissed the writ of certiorari.

This brief discussion of the *Rice* case demonstrates clearly that Petitioners' reliance on it is entirely misplaced. Unlike the *Rice* case, there is obviously no constitutional basis for granting certiorari in this case, whether on the basis of the Fourteenth Amendment, due process, equal protection, or any other constitutional right. Moreover, the Supreme Court in *Rice* makes clear that certiorari was granted only because some members of the Court deemed that Iowa's willingness to enforce a racially restrictive covenant rendered the case "special and important". Petitioners can point to no such special and important reasons in this case, whether on constitutional grounds or otherwise, to justify granting certiorari.

We respectfully submit that, Petitioners herein had ample opportunity to set forth their legal authorities without the need for any additional briefing before the Eleventh Circuit. The United States District Judge and Eleventh Circuit both specifically considered not only the transcript of the two-day evidentiary hearing before the United States Magistrate, but also the

objections to the Magistrate's Report and Recommendation filed by both parties, in affirming the Magistrate's conclusions. Further, Petitioners availed themselves of the procedure set forth in the Federal Rules of Appellate Procedures in making additional arguments to the Eleventh Circuit after filing their brief. Accordingly, the Eleventh Circuit did not depart from the accepted and usual course of judicial proceedings, having considered not only Petitioner's Supplemental Authorities, but also the objections filed by the parties to the Magistrate's Report and Recommendation.

II

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT ERR IN ITS APPLICATION OF THE STANDARD OF REVIEW OF THE ORDER.

The Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447 (1990), recently set out *an abuse of discretion standard* for review of lower court orders awarding Rule 11 sanctions. This standard is, of course, applicable to the Eleventh Circuit in this case.

The Eleventh Circuit had *ample* opportunity, based on the record in this case, to determine whether the District Court had abused its discretion in affirming the Report and Recommendation issued by the United States Magistrate after a two-day evidentiary hearing and after considering objections filed by both parties. The Rules of Appellate Procedure did not require, nor did the Eleventh Circuit deem it necessary or appropriate, to require yet another set of briefs to be submitted to it to assist in its determination of the correct view of the law, which briefs would in all likelihood recite the arguments presented in the parties' Objections filed to the Magistrate's Report and Recommendation and Supplemental Authorities.

Moreover, the Eleventh Circuit specifically discussed the abuse of discretion standard of review under *Cooter & Gell v. Hartmarx Corp.*, and held:

We have reviewed the district court's order incorporating the report and recommendations of the magistrate and conclude that *the district court did not abuse its discretion* in awarding sanctions in the amount of \$4,420.00. [Emphasis supplied.]

See Eleventh Circuit order dated July 30, 1990 (which is reproduced in Appendix A in the Petition for Writ of Certiorari).

Petitioners maintain that they never had the opportunity to argue the application of the abuse of discretion standard as contained in the *Cooter & Gell v. Hartmarx Corp.* case to the circumstances of this case. This argument is meritless. In an attempt to argue the merits of the application of the abuse of discretion standard, Petitioners submitted by letter pursuant to Fed. R. App. P. 28(j) (Supplemental Authorities), dated June 12, 1990, to the Clerk of the United States Circuit Court of Appeals for the Eleventh Circuit a copy of the *Cooter & Gell v. Hartmarx Corp.* case, and their analysis of that case as it applies to the instant case. Indeed, Petitioners specifically argued to the Eleventh Circuit in their letter:

While we cannot suggest that Cooter addresses the question whether the trial court's sanctions award or penalty is adequate or sufficient in terms of the amount (because the Court does not address that issue), it does appear that this court should address the question whether the trial court abused its discretion in the areas which we delineated in **DEFENDANTS' OBJECTION TO THE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS**, which has been forwarded to you.

Thus, Petitioner's analysis of the application of the abuse of discretion standard to the circumstances of

this case is part of the record in this case, and was considered by the Eleventh Circuit prior to it rendering its Order dated July 30, 1990, which Order is the basis for Petitioners' application for a Writ of Certiorari.

Thus, it is clear that the United States Court of Appeals for the Eleventh Circuit did not err in its application of the standard of review of the Order.

CONCLUSION

As a practical matter, the Eleventh Circuit specifically considered the parties' objections to the order granting sanctions, and thus did not depart from the accepted and usual course of judicial proceedings.

Accordingly, for the foregoing reasons, Respondent Lawrence J. Lewis, respectfully requests that the Petition for Writ of Certiorari filed by Petitioners be denied.

APPENDIX

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

LAWRENCE J. LEWIS, M.D.,
Plaintiff,

v .

Case No.86-654-Civ-T-13(C)

ANCLOTE MANOR HOSPITAL, INC., et al.,
Defendants.

ORDER

This cause is before the Court on limited remand from the United States Court of Appeals for the Eleventh Circuit.¹ In an Order dated April 7, 1989, the Hon. William J. Castagna denied the defendants' motions

1

The Eleventh Circuit's Order of April 10, 1990 directed the District Court to resolve this matter on or before May 9, 1990. In order to give the parties adequate time to prepare for an evidentiary hearing before the United States Magistrate and to then file any objections to the Magistrate's report and recommendation, the deadline imposed by the Court of Appeals could not be met.

for Rule 11 sanctions and to tax costs. The case subsequently was remanded to the District Court for the purpose of clarifying its reasons for refusing to impose Rule 11 sanctions against the plaintiff. Following remand, Judge Castagna entered an Order of recusal and vacated the Order denying sanctions and costs. The case then came before the undersigned, who (being involved in an on-going, protracted criminal trial) referred the matter to the United States Magistrate for her report and recommendation as to appropriate disposition of the case. The undersigned further directed the Magistrate to give fresh consideration to the issues to determine whether sanctions and/or costs are appropriate and, if so, in what amount.

The Magistrate conducted an evidentiary hearing on the matter and has filed her report recommending the imposition of sanctions against counsel for plaintiff in the amount of \$4,420.00.

Upon consideration of the report and recommendation of the Magistrate and upon this Court's independent examination of the entire file, including the objections of the parties to the report and recommendation, the Magistrate's report is adopted and confirmed and made a part hereof, and it is

ORDERED:

1. That sanctions be imposed against J. Miles Buchman, counsel for plaintiff, in the amount of \$4,420.00, and the Clerk is instructed to enter judgment accordingly.

2. That the Clerk unseal the Magistrate's report and recommendation and the objections to that report filed by the parties.

3. That the Clerk forward a copy of this Order, the Magistrate's Report and Recommendation, the transcript of hearing before the Magistrate, and the objections of the parties to the Clerk of the Court of Appeals.

DONE AND ORDERED in Chambers in Tampa, Florida
this 22nd day of May, 1990.

/s/ Wm. Terrell Hodges

